SUPREME COURT OF THE UNITED STATES

No. 868 October Term, 1970

Supreme Court, U.S.
FILED
OCT 17 1970
E. ROBERT SEAVER, CLERK

JOHN MICHAEL HARPER,

Petitioner

vs.

UNITED STATES OF AMERICA
(Federal Aviation Administration),

Appellant

PETITION FOR WRIT OF CERTIORARI

On appeal from the decision of SUMMARY JUDGMENT OF THE U. S. DISTRICT COURT and Judgment of the U. S. APPEALS COURT for the First Circuit

BRIEF FOR THE PETITIONER
Pages one to twelve.

John Michael Harper

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SUPREME COURT OF THE UNITED STATES

John Michael Harper,

Petitioner

vs.

United States
(Federal Aviation Administration)

Appellant

PETITION FOR WRIT OF CERTIORARI October 1970

1. (a) Summary judgment and opinion of the U. S. District court (Massachusetts) CA-69-437-C. (A-1), Amended Judgment (A-1a), Judgment of the U. S. Court of Appeals for the First Circuit Case 7554 (A-2).

(b) Judgment of the First Circuit Court of Appeals which found (without opinion) for the United States District Court's SUMMARY Judgment and Amended Judgment.

(i) Opinion and Judgment of the U. S. District Court issued February 4, 1970 and its Amended Judgment February 26, 1970. Judgment of the U. S. First Circuit Court of Appeals issued June 8, 1970 and mandate issued June 29, 1970.

(ii) Order of the Supreme Court of the United States granting an extension of time within which to petition for certiorari to October 16, 1970. Order dated August 20, 1970 (A-3).

(iii) The lower courts have decided a Federal question without jurisdiction and in such a manner that all statutes and constitutional rights of the petitioner have been violated.

(c) Statement of issues

(1) Did the U. S. District Court (Massachusetts) have jurisdiction of this case, when no administrative action was ever initiated, as provided by the Federal Air Regulations (FAR 13.19-) Appendix A4and U. S. Code 49-1429 (A-5).

(2) Can the Federal Aviation Administration go into Federal Court and circumvent a formal hearing before the FAA hearing officers and a hearing before the National Transportation Safety Board of the Department of Transportation as is provided in the FARS and the U. S. Statues to provide protection to certified airmen from malicious actions of individuals of the Federal Aviation Administration?

(3) Was there any FAA or NTSB hearing on the FAA complaint of June 1969 (now called the original complaint) or on the Amended Complaint, September 1969? Appendix (A-6) and (A-7).

(4) Did the petitioner have in his possession as required by FAA regulations a FAA Medical Certificate, (FAA Second Class, valid for commercial flights for one year) (A-8)?

(5) Was the Statement of Demonstrated Ability (Waiver) which was issued in July 1965 to the petitioner, for a hearing loss (by reason of a medical flight test) still current and valid? FAR 67-19 (A-9) Paragraph four of letter from FAA General Counsel to Senator E. M. Kennedy (A-10) Letter from Dr. A. J. Corney dated March 1968 (A-11).

(6) Was the FAA Medical Certificate issued in May 1968 by FAA Medical Examiner Dr. David E. Rosengard (A-8) ever suspended by the FAA, as provided for in FAR 67.31 (A-9)?.

(c) Statement of issues (continued)

(7) On such a preponderance of evidence supporting the petitioner in his appeal from SUMMARY judgment and the admitting of harassment from the FAA counsellor at the Appeals Court hearing did the Appeals Court and the U. S. District Court show legal and proper regard for the petitioner's constitutional rights? (A-12 Mr. Murphy's motion of February 24, 1970)

(8) Did the U. S. District Court Clerk act properly in retaining a reply to the original complaint by a dismissed attorney, and declaring moot and removing a petition to dismiss, for lack of jurisdiction. (A-13 District Court proceedings) (A-14 Petition of Mr. Waldron removed by clerk at the insistence of D. A. and FAA Counsel) (A-15 Petitioner's letter to the D. A and Clerk)

(9) Was malicious harassment of the petitioner or safety in air commerce the issue? (A-16 Court Transcript of January 5, 1970) (A-17 Court transcript of January 12, 1970).

(d) Acts, Statutes and Regulations

(i) Federal Aviation Regulations, Enforcement Procedures 13.19, 13.35, and 13.49 (A-5)

(ii) Federal Aviation, Airman Medical Standards and Certification 67.13, 67.19 and 67.31 (A-9)

(iii) United States Constitution, Bill of Rights, Right of fair trial. (Not necessary to be appended).

(e) Statement

The U. S. District Court (Massachusetts) did not have jurisdiction on the complaint of the FAA which alleged that the petitioner acted as pilot in command of an aircraft used in a night air mail contract with the Washington-Baltimore Helicopter Airways (now called Pioneer Airlines). There was no complaint filed with the petitioner, a 12,000 hour airline transport rated pilot with over thirty years of experience as a U. S. Air Force and commercial pilot. No charges of intended action as provided for under The Federal Air Regulations Section 13.19 (A-4) and U. S. Code (A-5) were ever filed against the petitioner, so it was impossible for him to request a hearing or an appeal to the National Transportation Safety Board. This is very clearly shown to the Court by a letter to the petitioner from the Chairman of the NTSB, Mr. John Reed, dated January 7, 1970. (A-27 Paragraphs one and seven)

The petitioner did have in his possession a valid and current FAA Second Class medical certificate during the time of the alleged complaint (November 1968)(A-8). Mr. Harper, the petitioner, was issued a waiver from the FAA audio requirements on July 15, 1965, by reason of a medical flight test and this waiver has continued to remain valid ever since and it is <u>still valid</u>, as

(c) Statement (continued)

there has been no decrease in the petitioner's hearing since the waiver was issued. The FAA Medical Department has received irrefutable evidence of this fact (A-11, A-22 and A-23) appendix statements by FAA First Region flight surgeon Dr. Marinelli, letter of Dr. A. J. Gorney, a medical board certified ear, nose and throat specialist, dated March 11, 1968 and a report a year later which the FAA Medical Department received. Appendix 21 shows both sides of the Statement of Demonstrated Ability. It is clearly shown that this statement remains in effect unless the condition for which it was issued has significantly deteriorated. Also note that this waiver has NO restrictions on it. Appendix 21 also shows the letter accompanying the waiver from FAA Flight Surgeon Dr. Molina. This is the normal procedure and any deviation from it <u>without cause</u> is malicious harassment.

The FAA Boston Area Office issued an emergency order against the petitioner's First Class Medical of May 15, 1967 on February 4, 1968, basing their action on their alleged claim that the petitioner's hearing had decreased. This order was signed by FAA Counsellor L. Sullivan, who based his order on a so-called whisper test, a test which the FAA Medical Department does not rely on, and did not do so in the petitioner's case. Appendix A-26 is a letter to Mr. Harper, the petitioner, from the FAA Medical Department, dated January 1966, which requested that he take an audiometer check at all future FAA medical examinations. The petitioner has done this, all showing no significant decrease in his audio level. Thus, the issuance of the emergency order of February 4, 1968 was a

(e) Statement (continued)

capricious action, as there was neither a complaint such as these orders are normally based on, nor did the FAA have any evidence as the FAA councellor claimed, that there had been a decrease of the petitioner's audio capabilities.

The Appeals Court for the First Circuit did not show the petitioner proper regards for his constitutional right of a fair trial, nor did it say why it did not (no opinion) reverse the District Court's SUMMARY Judgment, especially with all the preponderance of evidence submitted by the petitioner to the Appeals Court. (The petitioner is submitting a copy of the whole appendix which he submitted to the Appeals Court.) In the appellee's brief the FAA attorney submitted a reply containing no less than two dozen references to the TRIAL Court when it was, in fact, a SUMMARY COURT decision and not a trial at all. It was pointed out to the Appeals Court that the District Court made its judgment and opinion (A-1) on a reply that should have been removed from the docket, but had not been so removed. Only the petitioner's former lawyer's Motion to Dismiss for lack of jurisdiction was called moot. (Appendix A-3 District Court proceedings dated August 19 and September 29, 1969 and A-14 Motion for Dismissal by petitioner's former lawyer, Mr. G. Waldron, which was declared moot by the District Court Clerk - see Proceedings September 29, 1969).

It was further pointed out to the Appeals Court that harassment, not safety in air commerce as the FAA attorney so loudly proclaims, was the only FAA motive.

(e) Statement (continued)

In answer to a direct question from the bench the FAA counsellor replied that he did make harassing phone calls to the petitioner's employers and to other FAA offices. Add to this a direct threat made to the petitioner by this same counsellor, Mr. Lawrence Sullivan, that "You will be dead" when the petitioner phoned him to complain that it was an ill-advised letter that Sullivan had just sent him (A-24) and that he would send a copy to the FAA Administrator. Going so far out in its claim for legality, the FAA and the misinformed District Attorney mislead the Court in the FAA affidavit and claim that the FAA Emergency Order of February 4, 1968 was still in effect. Not only had this malicious order been complied with (A-24 Sullivan's letter October 1968) but the petition #7144 for review by Attorney F. L. Bailey was withdrawn, as the court record shows, and it was withdrawn because it would have been pointless, since the order had been complied with.

How could safety in air commerce be an issue, as the FAA counsellor claims, when on several occasions the petitioner has been offered a third class FAA medical IF he turned in his second or first class medical, (Appendix, A letter November 13, 1968 of Dr. P. V. Siegel, Federal Air Surgeon (A-20A). With a third class medical certificate the petitioner, an Airline Transport rated pilot could fly even a four engined aircraft any place any time, even full of passengers, as becomes a well qualified and experienced pilot, who has several solo trans-Atlantic and Pacific crossings in his log book.

This is so blatant a case of harassment that the FAA operational personnel did not even honor a summons

(c) Statement (continued)

to appear in court. This FAA Manager, Mr. W. E. Cullinan, also insisted that a restriction of "Not good for compensation or hire" be placed upon the petitioner's Flight Instructor Certificate.

(g) It has to be assumed that the U. S. District Court based its claim of jurisdiction upon the misleading affadavit of FAA Counsellor L. Sullivan and a statement (A-17) by the U. S. Assistant District Attorney, Mr. S. J. Suchecki, who stated that "all administrative action had been completed". These are added to the fact that the Clerk did not present in the docket the petitioner's motion to dismiss for lack of jurisdiction (A-19 and A-14). Thus the Court was misled into believing that the alleged complaint of the FAA , i. e. that the petitioner had acted as pilot in command of a commercial aircraft without a current FAA medical certificate, had been through the FAA enforcement procedures as required by the U. S. Code 49-1429. This is false, of course, and the FAA counsel and the U. S. District Attorney were acting illegally to cause harm to the petitioner.

1. (h) Argument

It is a conclusive argument that the facts presented here clearly show that the lower Courts have so far departed from the usual course of judicial proceedings as to call for this Court's power of supervision.

The facts of harassment and hoodwinking of Court officials, U. S. District Attorneys and Judges, admittedly not knowledgeable about this aviation business, are clearly shown. How else could a case like this be compelled to go to the Supreme Court, when, with about fifteen hundred alleged violations of the Federal Aviation Regulations a year, about one half of one percent only even reach the Appeals Court. Here is a case where a few FAA agents, aided by FAA attorneys, have processed, without even any evidence of wrongdoing being presented, a case through the Courts without even trying to process a complaint through the National Transportation Safety Board which is set up to oversee the operations of this government agency (U. S. Code 49-1429). There is no argument that the FAA has been given the responsibility for safety in air commerce, but like all governmental agencies, they have to comply with the statutes and regulations. No government agency is given the mandate in the guise of safety to harass any one, particularly a well qualified airman. It is the responsibility of the Federal Air Surgeon to suspend any Medical issued, if in his opinion its continued use would create a safety problem in air commerce. This has not been done to the LAST THREE FAA medicals issued by the FAA to the petitioner, simply because the FAA cannot substantiate any alleged claim that the Certificate of Demonstrated Ability is not legal and valid.

(h) Argument (continued)

The spurious claim that the FAA Federal Air Surgeon denied the petitioner's application for a second class medical on November 11, 1968 (A-20A) is refuted by a letter from Dr. P. V. Siegel, the Federal Air Surgeon, on December 2, 1968 (A-20B) which claims to reverse the issuance of the Medical issued May 1968 by reason of not supplying enough information to make a proper evaluation of the petitioner's hearing. This itself is wrong (A33 Dr. Gorney's letter) regarding FAR 67.31 (A-9) which states that the Flight Surgeon may suspend a certificate issued. This, of course, was never done and the medical remained valid until it expired for commercial flight in May of 1969. If this was not the case, then every certificate issued by the FAA would be subject to abuses of authority by any FAA official without cause.

CONCLUSION

1. It is therefore requested that this Honorable Court grant this Petition for Certiorari
2. That the FAA and the U. S. District Attorney acted knowingly and capriciously to do harm
3. That a permanent injunction be issued against the FAA to prevent further malicious harassment of the petitioner
4. That the petitioner is entitled to monetary damages to help to compensate for three pilot jobs which were illegally curtailed by action of the FAA agents
5. And whatever the Court considers fair to compensate the petitioner for damage to his professional reputation by the action of these governmental agencies

Conclusion (continued)

6. The petitioner requests to be heard in oral argument and if this is not allowed, that a qualified attorney be appointed to appear for him, as he cannot afford to hire a competent aviation attorney.

Under the penalites of perjury all statements made in this brief are true.

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Certificate of Service

I have this day, October 15, 1970, sent by Air Mail post paid one copy of this brief to the Solicitor General, Department of Justice, Washington, D. C. 20530 and I have notified the clerk of the U. S. Court of Appeals for the First Circuit, 1601 Post Office and Court Building, Boston, Massachusetts that I have submitted a Petition for Writ of Certiorari.

John N. Harper

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A-4 Federal Air Regulations 13.19, 13.35 and 13.49 (Enforcement)

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A-6 FAA Original Complaint to U. S. District Court June 1969

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A-21 Statement of Demonstrated Ability (waiver) and its accompanying letter from FAA Flight Surgeon

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 868

JOHN MICHAEL HARPER, PETITIONER

v.

UNITED STATES OF AMERICA
(FEDERAL AVIATION ADMINISTRATION)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We invite the Court's attention to the following facts which demonstrate that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on June 8, 1970. By order dated August 20, 1970, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including October 16, 1970. The petition was not filed until October 17, 1970.

Since the petition was not filed within the jurisdictional time limit fixed by Congress for civil cases

under 28 U.S.C. 2101(c), as here extended, the Court is without jurisdiction, and the petition should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 406111 292